Supreme Court, U.S.
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No. 93-89

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALPHONSO O. HOUSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court abused its discretion by admitting expert testimony on rape trauma syndrome in the government's rebuttal case.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, 1a-23a, is reported at 36 M.J. 392. The opinion of the Army Court of Military Review, Pet. App. 24a-25a, is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 19, 1993. The petition for a writ of certiorari was filed on July 19, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. III 1991).

STATEMENT

Following a general court-martial at Fort Campbell in Kentucky, petitioner was convicted of rape and adultery, in violation of Articles 120 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 and 934. Petitioner was sentenced to confinement for 40 years, a dishonorable discharge, and total forfeitures of pay and allowances. The convening authority approved only so much of the sentence as provided for confinement for 30 years, a dishonorable discharge, and total forfeitures. The Army Court of Military Review affirmed the rape conviction, but dismissed the adultery conviction. The Court of Military Appeals granted discretionary review and affirmed.

1. On August 6, 1988, petitioner raped a 15-year-old girl who had been staying at petitioner's home to care for his children. While sleeping in the den, the victim awoke to find that petitioner was having sexual intercourse with her. Petitioner stopped only when he heard his wife's car pull up at the house. Petitioner went to the bathroom to shower; the victim had to unlatch the door to let petitioner's wife in. The victim did not immediately report the rape to petitioner's wife. When petitioner and his wife went to bed, the victim went to the bathroom to clean herself. The following day, she told petitioner's wife about the rape. When confronted by his wife and the victim, petitioner denied raping the victim. Pet. App. 2a-3a.

2. Petitioner's defense was that no rape had occurred. In his opening statement, petitioner's counsel asserted that the proof would show that there was no resistance and that the victim did not immediately report the alleged rape. Petitioner aggressively cross-examined the victim about her inconsistent acts and statements. Pet. App. 3a.

In rebuttal, the government called Dr. Pamela Remer, a psychologist and professor at the University of Kentucky, to testify about rape trauma syndrome. Petitioner objected to her testimony on the ground that it would be more prejudicial than probative because Dr. Remer had not examined the victim. The trial judge overruled the objection. Petitioner conceded that Dr. Remer was qualified as an expert. Pet. App. 3a-4a.

Dr. Remer testified that rape trauma syndrome consists of six general stages. The first stage is the meeting between the rape victim and her attacker, and that most rape victims are acquainted with their attackers. The second stage is the rape itself. The third stage is the immediate aftermath of the rape, in which the victim may not report the rape because she feels that she is to blame, especially if she is acquainted with the victim. In that stage, a rape victim will often bathe or shower to clean herself physically and emotionally. If the victim has been raped in her sleep, she will experience additional confusion. Some victims react expressively by showing anger and fear, whereas other victims show no emotion at all. Finally, Dr. Remer identified the other stages, including the "denial stage," the "reliving stage," and the "integration stage." Pet. App. 4a-8a.

In response to various hypotheticals, Dr. Remer testified that a caretaker of children would not want the children to witness the attack; that if a victim woke up during a sexual attack, she might fail to resist; that a victim might fail to report a rape if she knew and previously trusted the rapist; and that the victim's first account of the rape might be distorted. She also testified that if a person were experiencing most of the symptoms that were mentioned in her model, that person "most likely" was suffering from rape trauma syndrome. Pet. App. 9a-10a.

On cross-examination, Dr. Remer admitted that her model of rape trauma syndrome was different from models employed by other professionals; that rape trauma syndrome was not mentioned in the revised version of the *Diagnostic and Statistical Manual of Mental Disorders* (3d rev. ed. 1987) (*DSM-III-R*) prepared by the American Psychiatric Association for use by mental health professionals; that she had not met or examined the victim; that a number of symptoms in her model could be caused by other disorders or normal adolescent problems; and that she did not know whether the victim had experienced the symptoms contained in her model. Pet. App. 10a.

In his final jury charge, the trial judge instructed the panel members that they did not have to accept Dr. Remer's testimony, even though she had been qualified as an expert witness. On the subject of hypothetical questions, the trial judge instructed the panel that if the members did not find that all of the facts assumed in the prosecutor's hypothetical questions were true, the panel could not consider Dr. Remer's answers to the prosecutor's hypotheticals. Pet. App. 11a.

3. The Army Court of Military Review affirmed petitioner's rape conviction. Pet. App. 24a-25a. It rejected without discussion his claim that the trial court had erred in allowing Dr. Remer to testify about rape trauma syndrome. *Id.* at 25a.

4. The Court of Military Appeals affirmed. Pet. App. 1a-23a. The court held that the trial judge properly admitted the rape trauma syndrome evidence under Mil. R. Evid. 702, which governs expert testimony. Pet. App. 11a-18a. Judge Wiss, concurring, believed that rape trauma syndrome evidence should be admitted only on the issues of whether the alleged victim had consented or whether any rape in fact had occurred, and stated that an expert witness does not have to examine the victim as a

precondition to testifying about rape trauma syndrome. *Id.* at 18a-20a. Judge Gierke concurred in the result. He believed that Dr. Remer's testimony went too far when she testified that if certain behavioral conduct was present a rape had occurred, but he concluded that the error was harmless. *Id.* at 20a-23a.

ARGUMENT

Petitioner contends that the trial judge erred in admitting, during the government's rebuttal case, expert testimony concerning rape trauma syndrome. That claim does not warrant review by this Court.

1. The military appellate courts correctly held that the trial court did not abuse its discretion in admittng Dr. Remer's expert opinions regarding rape trauma syndrome as part of the government's rebuttal presentation.

Rape trauma syndrome is a medical term used to describe the behavioral, somatic, and psychological reactions of rape and attempted rape victims. Rape victims usually undergo an acute phase and a long-term reorganization phase. In the acute phase, a victim might exhibit anger, fear, or anxiety—the "expressed style"—or she might mask her feelings with composed or subdued behavior—the "controlled style." In the reorganization stage, which typically begins several weeks after the crime, the victim attempts to reorder her life, such as by changing residences or telephone numbers, or by visiting family members. See P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 9-8 (1986). Rape trauma syndrome is a type of post-traumatic stress disorder. *Id.* at 304 n.124. Post-traumatic stress disorder is recognized as an anxiety disorder by the *DSM-III-R* at 247.

The admission of expert testimony in courts-martial is governed by Mil. R. Evid. 702. That rule, which is identical to Fed. R. Evid. 702, provides that if scientific, technical, or other specialized knowledge will assist the trier

of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify thereto in the form of an opinion or otherwise. The standard for admitting expert testimony under Fed. R. Evid. 702 is very liberal. The proponent of the expert testimony need only show that the expert will testify as to (1) scientific knowledge (2) that will assist the trier of fact to understand or determine a fact in issue. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795-2796 (1993). Rule 702 of the Federal Rules of Evidence does not incorporate the test first articulated in *Frye* v. *United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), which required the expert's opinion to be based on a scientific technique that has been generally accepted as reliable in the relevant scientific community. This Court recently so held in *Daubert*, 113 S. Ct. at 2793-2794. If an opposing party claims that the subject of the expert testimony is disputed in the scientific community, the solution is not to exclude the evidence, but for the opposing party to cross-examine the expert witness or to present contrary evidence, and for the trial court to instruct the jury on the appropriate burden of proof. *Daubert*, 113 S. Ct. at 2798.

The Court of Military Appeals' decision in this case is fully consistent with those principles. At trial, petitioner sought to show that his victim's failure to resist and to report the rape immediately was proof that no rape occurred. Petitioner presented that theory in his opening statement and by cross-examination of the victim. Accordingly, the government was entitled to rebut petitioner's defense by presenting evidence to show that the victim's allegedly counter-intuitive conduct was not inconsistent with the fact that she had been raped. In this regard, it was proper to present expert testimony concerning rape trauma syndrome, because that syndrome is a medical condition of which the average person may

not be aware. It was also proper to ask the jury to find from the evidence presented that the victim's post-offense conduct resulted from that syndrome, and therefore was not inconsistent with her having been raped.

The trial judge ensured that the rape trauma syndrome evidence was not unduly prejudicial to petitioner: Petitioner fully cross-examined the expert witness; petitioner was free to argue that the expert's opinions should not be credited and to present opposing proof; and the judge instructed the panel that it did not have to accept the expert's testimony or her answers to the prosecutor's hypothetical questions. That is all *Daubert* requires.

There is no merit to petitioner's contention that the expert's testimony was inadmissible because she did not personally evaluate the victim. Pet. 14. Dr. Remer merely testified concerning rape trauma syndrome generally. Because she did not express her opinion that the victim had suffered from rape trauma syndrome, she did not have to examine the victim personally. Second, Mil. R. Evid. 703, like Fed. R. Evid. 703, specifically provides that an expert may base an opinion on facts first made known to her at the hearing; a personal observation or examination is not required. Accordingly, Dr. Remer's failure to examine the victim did not bar the admission of her testimony.

Petitioner contends that the expert exceeded the limits of expert testimony by testifying that if a person were experiencing a majority of the symptoms described by her, that person "most likely" was suffering from rape trauma syndrome. Pet. 6. But although petitioner objected to the prosecutor's use of hypothetical questions in general on the ground that the expert had not examined the victim, Tr. 223, he did not specifically object to that particular exchange between the prosecutor and the expert, Tr. 227-229. Furthermore, if the expert's

opinion suggested that she believed that a rape had occurred, the expert dispelled that suggestion by testifying that she could not usurp the fact-finders' authority and that they had to determine whether an offense had been committed. Pet. App. 17a. Under these circumstances, petitioner was not prejudiced by the expert's opinion.[1]

2. There is no conflict among the circuits on the question presented by the petition. Few federal courts have addressed the question whether expert testimony about rape trauma syndrome can be admitted in a federal criminal prosecution, and none has held that such evidence is inadmissible. The Ninth Circuit has held that the government may present rebuttal expert testimony that the victim's post-offense conduct was caused by post-traumatic stress disorder, in kidnapping and forcible sex crime cases where the defendant raises the defense that the victim did not immediately report his acts or that her post-offense conduct suggests that she consented to his acts. See *United States* v. *Winters*, 729 F.2d 602, 604-605 (9th Cir. 1984) (post-traumatic stress syndrome); *United States* v. *Peralta*, 941 F.2d 1003, 1009-1010 (9th Cir. 1991) ("Stockholm syndrome"), cert. denied, 112 S. Ct. 1484 (1992); see also *United States* v. *Norquay*, 987 F.2d 475, 480 (8th Cir. 1993) (noting lack of support for argument that rape trauma syndrome is inadmissible in federal court). And the Seventh Circuit

[1] Although Judge Gierke believed that Dr. Remer's testimony should not have been allowed, he believed the error was harmless in light of the other evidence presented at trial. Pet. App. 23a. In addition to the victim's detailed testimony about the rape, Tr. 96-139, her examining physician testified that she had injuries caused by a forceful penetration of her vagina, Tr. 62-63. The victim's mother also testified that petitioner called her in an effort to enlist her help in keeping him out of jail, and that, during their conversation, he admitted that a rape may have occurred. Tr. 90.

has held that the admission of rape trauma syndrome in a state prosecution did not render the trial fundamentally unfair. See *Server* v. *Mizell*, 902 F.2d 611, 615 (7th Cir. 1990).[2]

Petitioner's observation, Pet. 8-14, that some States exclude rape trauma syndrome evidence is beside the point. First, it is not the function of this Court to "engage in a finely tuned review of the wisdom of state evidentiary rules." *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983).[3] Second, many of the States that either restrict or exclude rape trauma syndrome evidence do so on the basis of the *Frye* "general acceptance" test. See, *e.g.*, *People* v. *Pullins*, 378 N.W.2d 502 (Mich. Ct. App. 1985); *State* v. *Saldana*, 324 N.W.2d 227 (Minn. 1982). This Court, however, recently held in *Daubert* that the *Frye* test does not govern the admission of expert testimony under Fed. R. Evid. 702, so the rationale of those

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[2] Petitioner's reliance, Pet. 10, on *United States* v. *Sloan*, 811 F.2d 1359 (10th Cir. 1987), is misplaced. In *Sloan*, the Tenth Circuit stated in dictum that a nonexpert witness should not be permitted to testify about the victim's nervous condition to show that the victim had been raped. *Id.* at 1364. *Sloan* does not involve expert testimony admitted under Fed. R. Evid. 702. *United States* v. *Rohrer*, 708 F.2d 429 (9th Cir. 1983), and *United States* v. *Riley*, 657 F.2d 1377 (8th Cir. 1981), on which petitioner relies, Pet. 14, are wholly inapposite, since neither case involved rape trauma syndrome evidence. *Rohrer* upheld a district court's exclusion of expert psychiatric testimony about the credibility of a witness when the psychiatrists had not examined the witness. 708 F.2d at 434. *Riley* upheld a district court's refusal to order the psychiatric evaluation of a witness. 657 F.2d at 1387.

[3] See also *Medina* v. *California*, 112 S. Ct. 2572, 2576 (1992); *Estelle* v. *McGuire*, 112 S. Ct. 475, 480-481 (1991); *Burgett* v. *Texas*, 389 U.S. 109, 113-114 (1967); *Spencer* v. *Texas*, 385 U.S. 554, 564 (1967); *Lisenba* v. *California*, 314 U.S. 219, 228 (1941) ("We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence.").

state court decisions is inapplicable to the admission of evidence in the federal courts or at courts-martial.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner contends, Pet. 16, that admission of rape trauma syndrome evidence conflicts with the military's rape shield law, Mil. R. Evid. 412, because it will open the door to defense attacks on the victim's prior sexual history. This case does not present any such issue, however, because petitioner did not seek to introduce any evidence of the victim's prior sexual history following admission of the government's evidence regarding rape trauma syndrome. Accordingly, that issue is not ripe for review in this case.